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RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Attorneys for Defendants  
SMITHKLINE BEECHAM CORPORATION d/b/a  
GLAXOSMITHKLINE and McKESSON  
CORPORATION

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

JCS

RICHARD BOWLES, SAMUEL  
CANTEY, LUTHER CAULDER,  
JERLEAN CONWAY, ROBERT COX,  
HAROLD DUREN, ROGER INGRAM,  
ANN MCGARY, ALAN ORLOMOSKI,  
INEZ ORTIZ, MARLINE RANDALL,  
BETTY WITHROW

Plaintiffs,

v.

SMITHKLINE BEECHAM  
CORPORATION d/b/a  
GLAXOSMITHKLINE and McKESSON  
CORPORATION,

Defendants.

Case No.

CV 07

6328

**NOTICE OF REMOVAL AND  
REMOVAL ACTION UNDER 28 U.S.C.  
§ 1441(B) (DIVERSITY) and 28 U.S.C. §  
1441(C) (FEDERAL QUESTION) OF  
DEFENDANT SMITHKLINE  
BEECHAM CORPORATION d/b/a  
GLAXOSMITHKLINE**

**TO THE CLERK OF THE COURT:**

Defendant SMITHKLINE BEECHAM CORPORATION d/b/a  
GLAXOSMITHKLINE ("GSK"), hereby removes to this court, the state action described  
below. Removal is warranted under 28 U.S.C. § 1441 because this is an action over  
which this Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1332.

**I. BACKGROUND**

1. On November 8, 2007, Plaintiffs RICHARD BOWLES, SAMUEL

1 CANTEY, LUTHER CAULDER, JERLEAN CONWAY, ROBERT COX, HAROLD  
 2 DUREN, ROGER INGRAM, ANN MCGARY, ALAN ORLOMOSKI, INEZ ORTIZ,  
 3 MARLINE RANDALL and BETTY WITHROW ("Plaintiffs"), represented by The  
 4 Miller Firm of Orange, Virginia, commenced this action in the Superior Court of the  
 5 State of California for the County of San Francisco. A true and correct copy of the  
 6 Complaint in the action is attached as Exhibit "A" to the Declaration of Krista L. Cosner  
 7 in Support of Notice of Removal and Removal Action under 28 U.S.C. § 1441(b) and 28  
 8 U.S.C. § 1441(c) (Federal Question) of Defendant SmithKline Beecham Corporation  
 9 d/b/a GlaxoSmithKline (hereinafter "Cosner Decl.").

10 2. Defendants filed their answer to Plaintiffs' Complaint on December 12,  
 11 2007. *See* Cosner Decl. Exh. B. There have been no additional proceedings in the state  
 12 court action. Cosner Decl. ¶ 3.

13 3. This is one of many cases that have been filed recently in both federal and  
 14 state court across the country involving the prescription drug Avandia®. Cosner Decl. ¶  
 15 6. Plaintiffs' counsel, The Miller Firm, has filed Avandia cases in both state and federal  
 16 courts, but only in the cases filed in California has The Miller Firm named McKesson, or  
 17 any distributor, as a defendant. Cosner Decl. ¶ 7.

18 4. On October 16, 2007, the Judicial Panel on Multidistrict Litigation  
 19 ("JPML") issued an order directing that then-pending Avandia-related cases be  
 20 transferred and coordinated for pretrial proceedings in the United States District Court for  
 21 the Eastern District of Pennsylvania, before the Honorable Cynthia M. Rufe, pursuant to  
 22 28 U.S.C. § 1407. *See* Transfer Order, *In re Avandia Marketing, Sales Practices and*  
 23 *Products Liability Litigation*, MDL 1871 (E.D.P.A.) (a true and correct copy of which is  
 24 attached as Exhibit "C" to Cosner Decl.). Additional Avandia-related cases pending in  
 25 federal court, which are common to the actions previously transferred to the Eastern  
 26 District of Pennsylvania and assigned to Judge Rufe, are treated as potential tag-along  
 27 actions. *See id.*; *see also* Rules 7.4 and 7.5, R.P.J.P.M.L. 199 F.R.D. 425, 435-36 (2001).  
 28 GSK intends to seek the transfer of this action to that Multidistrict Litigation, *In re*

1 *Avandia Marketing, Sales Practices and Products Liability Litigation*, MDL 1871, and  
 2 shortly will provide the JPML with notice of this action pursuant to the procedure for  
 3 “tag along” actions set forth in the rules of the JPML. Cosner Decl. ¶ 8.

4 5. As more fully set forth below, this case is properly removed to this Court  
 5 pursuant to 28 U.S.C. § 1441 because GSK has satisfied the procedural requirements for  
 6 removal and this Court has subject matter jurisdiction over this action pursuant to 28  
 7 U.S.C. §§ 1331 and 1332.

## 8 **II. DIVERSITY JURISDICTION**

9 6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332  
 10 because this is a civil action in which the amount in controversy exceeds the sum of  
 11 \$75,000, exclusive of costs and interest, and is between citizens of different states.

### 12 **A. Diversity Of Citizenship**

13 7. The Complaint names twelve individual plaintiffs. *See* Cosner Decl., Exh.  
 14 A, ¶¶ 10-21:

15 a. Plaintiff Richard Bowles alleges that he is a “resident” of the State  
 16 of Kentucky. Accordingly, at the time this action was commenced, he was a citizen of  
 17 the State of Kentucky. *Id.* at ¶ 10.

18 b. Plaintiff Samuel Cantey alleges that he is a “resident” of the State of  
 19 South Carolina. Accordingly, at the time this action was commenced, he was a citizen of  
 20 the State of South Carolina. *Id.* at ¶ 11.

21 c. Plaintiff Luther Caulder alleges that he is a “resident” of the State of  
 22 North Carolina. Accordingly, at the time this action was commenced, he was a citizen of  
 23 the State of North Carolina. *Id.* at ¶ 12.

24 d. Plaintiff Jerlean Conway alleges that she is a “resident” of the State  
 25 of Louisiana. Accordingly, at the time this action was commenced, she was a citizen of  
 26 the State of Louisiana. *Id.* at ¶ 13.

27 e. Plaintiff Robert Cox alleges that he is a “resident” of the State of  
 28 Illinois. Accordingly, at the time this action was commenced, he was a citizen of the

1 State of Illinois. *Id.* at ¶ 14.

2 f. Plaintiff Harold Duren alleges that he is a “resident” of the State of  
3 Georgia. Accordingly, at the time this action was commenced, he was a citizen of the  
4 State of Georgia. *Id.* at ¶ 15.

5 g. Plaintiff Robert Ingram alleges that he is a “resident” of the State of  
6 Connecticut. Accordingly, at the time this action was commenced, he was a citizen of the  
7 State of Connecticut. *Id.* at ¶ 16.

8 h. Plaintiff Ann McGary alleges that she is a “resident” of the State of  
9 California. Accordingly, at the time this action was commenced, she was a citizen of the  
10 State of California. *Id.* at ¶ 17.

11 i. Plaintiff Alan Orlomoski alleges that he is a “resident” of the State  
12 of Connecticut. Accordingly, at the time this action was commenced, he was a citizen of  
13 the State of Connecticut. *Id.* at ¶ 18.

14 j. Plaintiff Inez Ortiz alleges that she is a “resident” of the State of  
15 Utah. Accordingly, at the time this action was commenced, she was a citizen of the State  
16 of Utah. *Id.* at ¶ 19.

17 k. Plaintiff Marline Randall alleges that she is a “resident” of the State  
18 of New Jersey. Accordingly, at the time this action was commenced, she was a citizen of  
19 the State of New Jersey. *Id.* at ¶ 20.

20 l. Plaintiff Betty Withrow alleges that she is a “resident” of the State of  
21 Tennessee. Accordingly, at the time this action was commenced, she was a citizen of the  
22 State of Tennessee. *Id.* at ¶ 21.

23 8. GSK is, and was at the time Plaintiffs commenced this action, a corporation  
24 organized under the laws of the Commonwealth of Pennsylvania with its principal place  
25 of business in Philadelphia, Pennsylvania, and therefore, is a citizen of Pennsylvania for  
26 purposes of determining diversity. 28 U.S.C. § 1332(c)(1). Cosner Decl. ¶ 9.

27 9. As explained in detail below, the remaining named defendant – McKesson,  
28 a Delaware corporation, with its principal place of business in San Francisco, California –

1 is fraudulently joined in this lawsuit and its citizenship must be ignored for the purpose of  
 2 determining the propriety of removal.<sup>1</sup> See *McCabe v. General Foods*, 811 F.2d 1336,  
 3 1339 (9th Cir. 1987). Accordingly, there is complete diversity of citizenship and the  
 4 forum defendant rule is not implicated in this case.

5 **B. The Amount In Controversy Requirement Is Satisfied**

6 10. It is apparent on the face of the Complaint that Plaintiffs seek an amount in  
 7 controversy in excess of \$75,000, exclusive of costs and interest.

8 11. Plaintiffs allege that, as a result of their Avandia use, they "have suffered  
 9 heart injury, excessive fluid retention, fluid-overload disease, liver damage, liver failure,  
 10 stroke and severe injury to the heart leading to cardiac arrest," and have sustained,  
 11 "physical and financial damages including pain and suffering." See Cosner Dec. Exh. A,  
 12 44:18-20. They further allege severe and permanent physical injuries. See *id.* at 61:20.

13 12. Plaintiffs claim to have "suffered extensive monetary and pecuniary losses  
 14 and other compensatory damages," and to have "incurred and paid out necessary medical,  
 15 hospital, and concomitant expenses," which they allege will continue into the future. See  
 16 Cosner Decl. Exh. A, 52:2-4, 61:22-23.

17 13. Plaintiffs seek actual, punitive and exemplary damages. See Cosner Decl.  
 18 Exh. A, 53:8, 61:3-4.

19 14. Punitive damages are included in the calculation of the amount in  
 20 controversy. See *Bell v. Preferred Life Assurance Society*, 320 U.S. 238, 240 (1943).

21 15. Given the allegations set forth above, the face of the Complaint makes clear  
 22 that Plaintiffs seek in excess of \$75,000, exclusive of interest and costs. See *Simmons v.*  
 23 *PCR Tech.*, 209 F. Supp. 2d 1029, 1031 (N.D. Cal. 2002).

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24  
 25  
 26 <sup>1</sup> Moving defendant notes that the citizenship of the California plaintiff is not diverse from that of  
 27 McKesson. However, as set forth, the citizenship of McKesson must be ignored because McKesson has  
 28 been fraudulently joined as a defendant. Proper ignorance of McKesson's citizenship renders the  
 California plaintiff diverse.

C. **The Citizenship Of McKesson Must Be Ignored Because McKesson Is Fraudulently Joined**

16. A defendant is fraudulently joined, and its presence in the lawsuit is ignored for purposes of determining diversity, "if the plaintiff fails to state a cause of action against the resident defendant, and the failure is obvious according to the settled rules of the state." *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001); *see also Hamilton Materials, Inc. v. Dow Chemical Corporation*, \_\_\_\_ F.3d \_\_\_\_, (9th Cir. 2007), 2007 WL 2080179 at \*1 (9th Cir. 2007).

17. McKesson is fraudulently joined because Plaintiffs have failed to make any material allegations against it. *See Brown v. Allstate Insur.*, 17 F. Supp. 2d 1134, 1137 (S.D. Cal. 1998) (finding in-state defendants fraudulently joined where "no material allegations against [the in-state defendants] are made"). Plaintiffs specifically allege that Avandia was created and marketed by GSK; that GSK had longstanding knowledge of Avandia-related dangers which GSK failed to adequately warn and disclose to consumers; that GSK concealed, suppressed and failed to disclose these referenced dangers; that GSK has represented and has continued to represent that it manufactures and/or sells safe and dependable pharmaceuticals; that GSK has failed to adequately warn or inform consumers, such as Plaintiffs or Plaintiffs' prescribing physicians of known defects in Avandia; and that as a result of GSK's omissions and/or misrepresentations, Plaintiffs ingested Avandia. *See Cosner Decl. Exh. A*, at ¶¶ 32:14, 36:20-22, 37:5-6, 38:9-10, 43:12-13, 44:17-18.

18. Plaintiffs fail to make any specific material assertions against McKesson, and do not allege that they ingested Avandia that was distributed by McKesson, compelling the conclusion that Plaintiffs have fraudulently joined McKesson in an attempt to defeat diversity jurisdiction. *See e.g., Lyons v. American Tobacco Co.*, No. Civ. A. 96-0881-BH-S, 1997 U.S. Dist. LEXIS 18365 (S.D. Ala. 1997) (holding that there is "no better admission of fraudulent joinder of [the resident defendant]" than the failure of the plaintiff "to set forth any specific factual allegations" against them).

1 Plaintiffs cannot cure this deficiency by simply relying on allegations directed toward  
2 “Defendants” or GSK alone.

3 19. In the body of the Complaint, Plaintiffs assert claims of: (1) negligence; (2)  
4 negligent failure to adequately warn; (3) negligence per se; (4) negligent  
5 misrepresentation; (5) breach of express warranty; (6) breach of implied warranty; (7)  
6 strict products liability – defective design; (8) strict products liability – manufacturing  
7 and design defect; (9) strict products liability – failure to adequately warn; (10)  
8 fraudulent misrepresentation; (11) violations of California Unfair Trade Practices and  
9 Consumer Protection Law; (12) unjust enrichment; and (13) punitive damages. In these  
10 allegations, Plaintiffs aver that collectively, “Defendants” or “Defendants GSK and  
11 McKesson,” defectively designed and manufactured the product; concealed knowledge of  
12 unreasonably dangerous risks associated with the product; failed to conduct adequate and  
13 sufficient pre-clinical testing and post-marketing surveillance of the product; failed to  
14 provide FDA with complete and adequate information regarding the product; failed to  
15 warn consumers and/or their health care providers of certain risks associated with the  
16 product; failed to utilize adequate and non-misleading labeling; and made affirmative  
17 misrepresentations and omissions regarding the risks associated with taking Avandia. All  
18 of these claims are substantively based on the design and manufacture of the product,  
19 failure to warn, fraudulent concealment, and inadequate pre-clinical testing and post-  
20 marketing surveillance. As a wholesale distributor of Avandia, McKesson played no role  
21 in its testing, marketing or advertising. All McKesson did was pass along unopened  
22 boxes of Avandia, in unadulterated form, to hospitals and other businesses in the  
23 healthcare industry. *See* Cosner Decl. Exh. D, ¶¶ 6-7.<sup>2</sup>

24  
25 <sup>2</sup> The Declaration of McKesson’s representative, Greg Yonko, may be considered by the Court in  
26 determining whether McKesson is fraudulently joined. *Maffei v. Allstate California Ins. Co.*, 412  
27 F.Supp.2d 1049 (E.D. Cal. 2006) (“[t]he court may pierce the pleadings, consider the entire record, and  
28 determine the basis of joinder by any means available”) *citing* *Lewis v. Time, Inc.*, 83 F.R.D. 455 (E.D.  
Cal. 1979) (“it is well settled that upon allegations of fraudulent joinder...federal courts may look beyond  
the pleadings to determine if the joinder...is a sham or fraudulent device to prevent removal”). *See also*  
*Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318-19 (9th Cir. 1998) (evidence may be presented by the  
(continued...))

1           20. Further, based on the “learned intermediary” doctrine, McKesson bore no  
2 duty to warn Plaintiffs. The “learned intermediary” doctrine, the foundation of  
3 prescription drug product liability law, provides that the duty to warn about a drug’s risks  
4 runs from the manufacturer to the physician (the “learned intermediary”), and then from  
5 the physician to the patient. *See Brown v. Superior Court (Abbott Labs.)*, 44 Cal. 3d  
6 1049, 1061-62, n.9 (1988); *Carlin v. Superior Court (Upjohn Co.)*, 13 Cal. 4<sup>th</sup> 1104, 1116  
7 (1996). It is the physician, and only the physician, who is charged with prescribing the  
8 appropriate drug and communicating the relevant risks to the patient. *See Brown*, 44 Cal.  
9 3d at 1061-62.

10           21. GSK and the FDA prepared the information to be included with the  
11 prescription drug, Avandia, with the FDA having final approval of the information that  
12 could be presented. Once the FDA has determined the form and content of the  
13 information, it is a violation of federal law to augment the information. *See* 21 U.S.C.  
14 §331(k) (prohibiting drug manufacturers and distributors from causing the “alteration,  
15 mutilation, destruction, obliteration, or removal of the whole or any part of the labeling”  
16 of an FDA-approved drug held for sale); *Brown v. Superior Court*, 44 Cal.3d 1049, 1069  
17 n.12 (noting that the FDA regulates the testing, manufacturing, and marketing of drugs,  
18 including the content of their warning labels). Therefore, any safety and warning  
19 information McKesson had about Avandia would have come from GSK in the form of  
20 FDA-approved packaging and labeling. McKesson could not change the labeling it was  
21 given by GSK as approved by the FDA without violating federal law. No duty can be  
22 found where it requires a party to violate the law to fulfill it.

23           22. As such, given the lack of a causal connection between the injuries alleged  
24 by Plaintiffs and McKesson’s conduct, as well as the absence of any legal or factual basis  
25 for Plaintiffs’ claims against McKesson, McKesson’s joinder is fraudulent and its  
26 \_\_\_\_\_

27 (continued...)

28 removing party that there is no factual basis for the claims pleaded against the local defendant).

1 citizenship should be ignored for purposes of determining the propriety of removal.

2 **III. FEDERAL QUESTION JURISDICTION**

3 23. This Court has federal question jurisdiction over Plaintiffs' claims under  
4 28 U.S.C. § 1331 and the principles set forth in *Grable & Sons Metal Prods., Inc. v.*  
5 *Darue Eng'g & Mfg.*, 125 S. Ct. 2363 (2005).

6 24. As more fully explained below, Plaintiffs have made violations of federal  
7 law critical elements of several of their claims.

8 **A. Plaintiffs' Claims Require Construction and Application of the FDCA**  
9 **and Its Implementing Regulations**

10 25. Count III of Plaintiffs' Complaint, "Negligence Per Se," explicitly alleges  
11 that defendants violated federal law. Plaintiffs claim, *inter alia*, that "[d]efendants  
12 "violated the Federal Food, Drug and Cosmetic Act, 21 U.S.C. Section 301 *et seq.*,  
13 related amendments and codes and federal regulations provided thereunder, and other  
14 applicable laws, statutes, and regulations." *See* Cosner Decl. Exh A, ¶ 65.

15 26. Plaintiffs further claim that "[d]efendants' acts constituted an adulteration  
16 and/or misunderstanding [*sic*] as defined by the Federal Food, Drug and Cosmetic Act,  
17 21 U.S.C. § 331. . . ." *See* Cosner Decl. Exh A, ¶ 67.

18 27. Moreover, Count II of the Plaintiffs' Complaint, "Negligent Failure to  
19 Adequately Warn," and Count IX, "Strict Products Liability – Failure to Adequately  
20 Warn," also require construction and application of the FDCA and implementing federal  
21 regulations, which govern approval of prescription drugs and regulate prescription drug  
22 manufacturers' public and promotional statements, including all aspects of warnings and  
23 labeling.

24 28. As a currently-marketed prescription drug, Avandia is subject to extensive  
25 regulation by the FDA. The FDCA requires the FDA to ensure that "drugs are safe and  
26 effective" for their intended uses, 21 U.S.C. § 393(b)(2)(B), in part by "promptly and  
27 officially reviewing clinical research and taking appropriate action on the marketing of  
28 regulated products." 21 U.S.C. § 393(b)(1). The Secretary of the FDA has the authority

1 to promulgate regulations to enforce the FDCA, which are codified in the *Code of*  
2 *Federal Regulations*, 21 C.F.R. § 200, *et seq.* See 21 U.S.C. § 371(a).

3 29. To accomplish its purpose, the FDA maintains a Center for Drug  
4 Evaluation and Research (the “CDER”). The CDER regulates pharmaceutical  
5 companies’ development, testing and research, and manufacture of drugs. The CDER  
6 examines data generated by these companies to conduct a risk/benefit analysis and make  
7 an approval decision. The CDER also ensures truthful advertising for prescription drugs,  
8 in part by approving Package Inserts that properly outline benefit and risk information.  
9 Once drugs are marketed, the CDER continues to monitor them for unexpected health  
10 risks that may require public notification, a change in labeling, or removal of the product  
11 from the market. In short, the CDER evaluates and monitors the effectiveness and safety  
12 of prescription drugs. See <http://www.fda.gov/cder/about/faq/default.htm>.

13 30. Promotional communications to physicians about Avandia are contained  
14 within, and restricted by, warning, labeling, and promotional materials, such as the  
15 Package Insert, that are approved and monitored by the FDA to ensure the provision of  
16 accurate information about the drug’s respective risks and benefits. Under federal  
17 regulations, even claims in promotional labeling or advertising must be consistent with  
18 approved labeling. 21 C.F.R. § 202.1(e)(4) (2005).

19 31. The FDA’s responsibility to regulate prescription drugs sold in the United  
20 States, and to enforce laws with respect to such drugs, inclusive of the precise content  
21 and format of prescription drug labeling (*e.g.*, the instructions, warning, precautions,  
22 adverse reaction information provided by manufacturers, and marketing materials), is  
23 plenary and exclusive. See 21 U.S.C. § 301, *et seq.*

24 32. Plaintiffs have explicitly alleged violations of federal law in their  
25 “Negligence Per Se” claim, and have made alleged violations of federal law a critical  
26 element of their “Negligent Failure to Adequately Warn” and “Strict Products Liability –  
27 Failure to Adequately Warn” claims. Accordingly, Plaintiffs’ claims necessarily raise  
28 substantial federal questions by requiring the Court to construe and apply the FDCA and

its implementing regulations.

**B. Federal Control of Drug Labeling and Warning**

33. On January 24, 2006, the FDA announced a rule that includes a detailed and emphatic statement of the FDA's intention that its regulation and approval of prescription drug labeling preempt most state law claims related to the adequacy of prescription drug warnings because such claims frustrate "the full objectives of the Federal law." *See* Requirements on Content and Format of Labeling for Human Prescription Drug and Biologic Products, 71 Fed. Reg. 3922, 3934 (Jan. 24, 2006) ("FDA believes that under existing preemption principles, FDA approval of labeling under the act. . . . preempts conflicting or contrary State law."). *See also In re Bextra and Celebrex Marketing*, 2006 WL 2374742 (N.D. Cal., August 16, 2006) (Celebrex decision); *In re Bextra and Celebrex Marketing*, 2006 WL 2472484 (N.D. Cal., August 24, 2006) (Bextra decision).

34. Plaintiffs allege that GSK failed to disclose certain risks of Avandia. *See e.g., Cosner Decl. Exh. A, ¶ 36:21-2.* This allegation necessarily requires Plaintiffs to establish that the FDA, which has exclusive jurisdiction over the labeling of drugs, would have approved the warning the Plaintiffs allege should have been given.

35. Accordingly, there is a substantial federal question with respect to whether Plaintiffs can claim that GSK violated state law in light of the FDA's control of Avandia's labeling and warning and its position on conflict preemption.

**C. The Federal Interest In Providing A Forum**

36. The federal government has a strong interest in having a federal court decide several of the issues in this case. Among these issues are:

- a. whether any conduct of GSK violated any federal laws or regulations related to the labeling and marketing of Avandia; and
- b. whether the FDA-approved Avandia label was false and misleading, as alleged by Plaintiff, and whether a state may impose liability on GSK for not providing more information regarding certain risks, as

1 Plaintiff contends GSK should have done.

2 37. Plaintiffs' claims may be vindicated or defeated only by construction of  
3 federal statutes and regulations. The availability of a federal forum to protect the  
4 important federal interests at issue is therefore consistent with *Grable*, and determination  
5 by a federal court of the substantial and disputed federal issues that lie at the heart of this  
6 case would not "disturb any congressionally approved balance of federal and state  
7 judicial responsibilities." *Grable*, 125 S. Ct. at 2368.

8 **IV. CONFORMANCE WITH PROCEDURAL REQUIREMENTS**

9 38. This Court has jurisdiction over this matter based on federal question and  
10 diversity of citizenship, and the present lawsuit may be removed from the Superior Court  
11 of the State of California for the County of San Francisco, and brought before the United  
12 States District Court for the Northern District of California pursuant to 28 U.S.C. §§  
13 1331, 1332 and 1441.

14 39. Defendant GSK has not yet been served with Plaintiffs' Complaint. Cosner  
15 Decl. ¶ 10. Defendant McKesson was served with Plaintiffs' Complaint on November  
16 14, 2007. *See* Cosner Decl. Exh. D, ¶ 4. Therefore, this Removal has been timely filed  
17 within 30 days of service, pursuant to 28 U.S.C. § 1446(b).

18 40. All of the properly joined and served defendants consent to this removal.  
19 Although McKesson's consent to remove is not necessary because it is fraudulently  
20 joined, McKesson nonetheless consents to removal. *See* Cosner Decl. Exh. D, ¶ 5. *See*  
21 *also, e.g. Easley v. 3M Company, et al.*, 2007 WL 2888335 (N.D. Cal. 2007) *citing*  
22 *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1193 n.1 (9th Cir. 1988).

23 41. The United States District Court for the Northern District of California is  
24 the federal judicial district encompassing the Superior Court of the State of California for  
25 the County of San Francisco, where this suit was originally filed. Venue therefore is  
26 proper in this district under 28 U.S.C. § 1441(a).

27 42. Pursuant to the provisions of 28 U.S.C § 1 446(d), GSK will promptly file a  
28 copy of this Notice of Removal with the clerk of the Superior Court of the State of


1 California for the County of San Francisco, where this suit was originally filed.

2 43. Defendant reserves the right to amend or supplement this Notice of  
3 Removal.

4 **WHEREFORE**, GSK respectfully removes this action from the Superior Court of  
5 the State of California for the County of San Francisco to the United States District Court  
6 for the Northern District of California, pursuant to 28 U.S.C. § 1441.

7 Dated: December 13, 2007

DRINKER BIDDLE & REATH LLP

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9  
10 DONALD F. ZIMMER, JR.  
KRISTA L. COSNER

11 Attorneys for Defendants  
12 SMITHKLINE BEECHAM  
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GLAXOSMITHKLINE and McKESSON  
14 CORPORATION